Supreme Court, U.S.
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No. 01-___

IN THE

Supreme Court of the United States

COMMONWEALTH EDISON CO.,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *en banc* Federal Circuit erred in adopting, in acknowledged conflict with other circuits, a *per se* test that avowedly immunizes even "severely retroactive" governmental exactions from constitutional challenge, and that accords no weight to such important factors as: the period of retroactivity, the amount of the exaction, the assessed party's comparative responsibility, the government's own commercial self-interest in imposing the assessment, or the expectations created by the assessed parties' contracts with the government.

2. Whether the wholly retroactive assessment at issue in this case, which requires private parties to pay $2.25 billion based on transactions dating back to 1959, and which the government adopted with the avowed purpose of increasing the sales price of a commercial enterprise it was simultaneously divesting, violates the Takings or Due Process Clauses.

3. Whether certiorari should be granted to review the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines.

RULE 29.6 STATEMENT

Exelon Corporation is the parent corporation of Petitioner Commonwealth Edison Company. No other publicly held company owns ten percent or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Commonwealth Edison Company respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's *en banc* opinion (Pet. App. 1a-52a) is reported at 271 F.3d 1327. The opinion of the Court of Federal Claims dismissing Commonwealth Edison's complaint (Pet. App. 81a-101a) is reported at 46 Fed. Cl. 29 (1999).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Appendix (at 155a-174a) reproduces relevant provisions of Titles IX, X, and XI of the Energy Policy Act of 1992, P.L. 102-486 (Oct. 24, 1992) ("EPACT").

JURISDICTION

The Federal Circuit entered its opinion on November 20, 2001. On February 12, 2002, the Chief Justice extended the time to file this Petition to and including March 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

I. Background. This case arises from the single largest, and most "severely retroactive" (Pet. App. 31a) governmental exaction of money in this Nation's history. Starting in 1945, the government built and began operating uranium enrichment plants. Until 1969, the government dedicated its plants almost exclusively to supporting military programs. *Id.* 3a. The government began making commercial sales of enriched

uranium in 1969, after Congress amended the Atomic Energy Act of 1954 ("AEA") to permit that practice.[1]

Regarding commercial sales, Congress directed the Atomic Energy Commission ("AEC") to "establish criteria in writing setting forth the terms and conditions" and to submit those criteria, and any changes thereto, for congressional approval. AEA § 161(v). The AEC and its successor agencies, including the Department of Energy ("DOE"), promulgated detailed "standard" contracts for private utilities based upon the published criteria. The contracts required customers to furnish unenriched uranium ("feed material") to the government. The government accepted title to this material and subsequently produced and delivered enriched uranium. Court of Appeals Supplemental Appendix ("A.S.A.") 2-4. From the outset, the contracts provided that customers would pay fixed prices, based upon published rates, for government-enriched uranium. Court of Appeals Joint Appendix ("J.A.") 526, ¶ 26; Pet. App. 4a-5a.

It is undisputed that, at all times, the government had complete dominion over and full responsibility for operation of its plants, storage of uranium in its possession, and disposal of waste material generated by the enrichment process. J.A. 525.[2] The contracts specified that customers assumed title (and, therefore, responsibility for) enriched uranium they purchased only after delivery of the material by the government. A.S.A. 206. Nothing in the contracts (or underlying regulations) indicated that purchasing the services could subsequently render the customer responsible for anything other than paying the contractually specified price. J.A. 541.

The government dominated the uranium enrichment market until the late 1970s, when viable foreign competition emerged.

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[1] See Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964). Previously, the government "leased" small quantities of low-enriched uranium to some civilians. Court of Appeals Joint Appendix 524-25.

[2] The contracts specified that the government would maintain ownership over residual materials produced by the process – such as depleted uranium or "tails." J.A. 61.

J.A. 532. The government soon became "the world's highest-priced supplier of enrichment services," however, and its market share plummeted. *Id.* 585, 532-533. DOE responded by developing a new contract and launching an "extensive marketing campaign" to induce Petitioner (and other utilities) to remain customers. *Id.* 533; A.S.A. 59, ¶ 23. DOE offered more flexible terms, lower pricing (including a "double price guarantee," (A.S.A. 61)), promises that prices would be controlled in the future, and representations by high-ranking government officials that the prices specified represented the full amounts utilities would be obligated to pay for the services. J.A. 533; A.S.A. 60-64.

Between 1959 and 1992 (and principally after 1969), Petitioner purchased approximately 14 million "separative work units" ("SWUs") – the relevant measure under the contracts – of government enrichment services. J.A. 531. It is undisputed that, in reliance on the fixed-price nature of the enrichment contracts and the government's representations regarding all-inclusive pricing, Petitioner bypassed opportunities to purchase enriched uranium from other sources.

II. EPACT's Imposition of Retroactive Liability. In 1992, the government's share of the market dwindled further and DOE lobbied Congress to exit the business. J.A. 536-37. The government's exit strategy turned on creation of a government-owned corporation, the United States Enrichment Corporation ("USEC"), which would perform enrichment services on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," followed by the sale of the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5, *repealed by* USEC Privatization Act, 42 U.S.C. 2297h-5(d). The government had long recognized that it would ultimately be required to decontaminate and decommission ("D&D") its enrichment plants, which had become heavily contaminated while dedicated to military programs. J.A. 524-25.[3] Recognizing that liability

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[3] Indeed, a DOE-sponsored study plainly concluded that "[i]n 1969, when commercial production began the [enrichment] plants were already

for decontaminating and decommissioning expenses would depress USEC's sales price and hence substantially reduce the profits to the U.S. Treasury, the government essentially transferred the assets of its enrichment business to USEC but retained liability for environmental remediation. J.A. 537-38. See generally H.R. Rep. No. 102-474, Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064 (1992). Pursuant to this arrangement, the government sold USEC to private investors in 1998 for *$1.4 billion*. James K. Glassman, *The Inside Scoop*, WASH. POST, Aug. 30, 1998, at H1.

The government established a Decontamination and Decommissioning Fund ("D&D Fund") to finance its clean-up responsibility. See 42 U.S.C. 2297g-1 *et seq.*; 10 C.F.R. 766.1 *et seq.* The D&D Fund was also designed to defray other expenses unrelated to the government's operation of the enrichment plants. Most significantly, EPACT allocated up to $310 million to clean up *privately owned and operated* thorium and uranium production facilities. 42 U.S.C. 2296a (1992). This amount has been periodically increased, so that up to *$490 million* of the D&D Fund may now be allocated to clean up private facilities that have no nexus whatsoever to the uranium enrichment contracts. Pub. L. No. 105-388, § 11(a).[4]

To help finance the D&D Fund, Congress imposed a "special assessment" of up to $150 million per year (adjusted for inflation) on "domestic utilities" that had purchased government-enriched uranium. 42 U.S.C. § 2297g-1(c) to -(e). Several features of the assessments are particularly noteworthy:

• The assessments are wholly retroactive: each utility's share is based on the amount of government-enriched uranium

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contaminated and the need to conduct D&D was well established." A.S.A. 282. And "the level of decontamination effort required for process buildings [was] *no greater* [in 1992] than the effort that would have been required in 1965 if all the facilities had been required to have been decommissioned at that time." *Id.* 281.

[4] The $75 million figure cited by the opinion below (Pet. App. 33a n.19) is misleading because it represents only expenditures to date.

acquired before October 24, 1992.[5] *Id.* Petitioner is assessed for transactions made as early as 1960 (J.A. 519), and liability potentially attaches for other utilities to transactions dating back to the inception of the plants in 1945.

- The assessments are massive: they are payable annually for fifteen years and will ultimately impose liability of $2.25 billion. Petitioner has thus far paid more than $140 million in D&D Fund assessments and its total liability will exceed $235 million. J.A. 45, 539-40.

- Liability is imposed notwithstanding that utilities were *not* substantially responsible for increasing the costs of environmental remediation. As the government explicitly acknowledged below, the "assessments are *not* premised upon any responsibility [by the utilities] for contamination" at the government's enrichment facilities (Gov't C.A. Br. 31 (emphasis added)). Indeed, the plants were contaminated long before the commercial sales program began. J.A. 525.

III. The Proceedings Below. Petitioner's amended Court of Federal Claims complaint asserts that the retroactive D&D Fund assessment: (1) constitutes an unlawful taking; (2) violates due process; and (3) breaches the fixed-price terms of its contracts with the government. J.A. 517-553. The court granted the government's motion to dismiss the complaint for failure to state a claim. See Pet. App. 81a-124a. The Federal Circuit *sua sponte* ordered the case heard *en banc* and ultimately affirmed by a divided vote. See *id.* 1a-52a.

Preliminarily, the Federal Circuit held that the Court of Federal Claims has *exclusive* trial jurisdiction, and that the Federal Circuit thus has exclusive appellate jurisdiction, over the

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[5] Eighty-five percent of utilities' acquisitions were made directly from the government. Utilities also obtained material through "secondary market" transactions in which utilities transferred their contractual right to receive government-enriched uranium to other parties. EPACT imposes the assessment on the ultimate purchaser. See 10 C.F.R. 766.101.

great majority of challenges to retroactive federal exactions. See Pet. App. 15a.[6]

Addressing the merits, the *en banc* majority first rejected out of hand Petitioner's claim under the Takings Clause, invoking the view of five Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), that an order to pay money, without more, cannot constitute a taking. Pet. App. 18a-20a (citing 524 U.S. at 540 (1998) (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting)). The *en banc* court next adopted the view of a prior panel that the EPACT assessments constituted a "sovereign act" and thus could not be the subject of a breach of contract claim against the government. Pet. App. 21a-22a.

Finally, the *en banc* majority rejected Petitioner's claim under the Due Process Clause. Conceding that the special assessments were "severely retroactive and costly" (Pet. App. 31a), the majority held that they were properly sustained under a two-part test the court announced to govern such claims: (1) "the party subjected to the retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party"; and (2) "the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.*

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[6] The Federal Circuit specifically held that its jurisdiction is exclusive because the Court of Federal Claims can provide an "adequate remedy" not only for requests for monetary relief for violations of the Takings Clause pursuant to the Tucker Act, but also for due process claims (which it characterized as alleging an "illegal exaction") and requests for prospective injunctive and declaratory relief. Adopting the reasoning of a prior panel decision (*Consolidated Edison Co.* v. *United States*, 247 F.3d 1378, 1384 (CAFC), *cert. denied*, 122 S. Ct. 644 (2001)), the *en banc* Federal Circuit concluded as a matter of law that all such suits must be heard in the Court of Federal Claims rather than federal district court, because "a claimant with an alternative adequate remedy in another court, such as the Court of Federal Claims, cannot seek review of agency action in a district court under the [Administrative Procedure Act]." *Consolidated Edison*, 247 F.3d at 1383 (discussing 5 U.S.C. 704 (providing that waiver of sovereign immunity applies only when no "adequate remedy" is available elsewhere, including in the Court of Federal Claims)).

Under this test, the Federal Circuit gave no weight to several considerations cited by Petitioner that called EPACT's constitutionality into question, such as the amount of the assessment, the extremely long period of retroactivity, and the government's self-interest in imposing the assessment, acknowledging that its *per se*, two-part test conflicted with decisions of the Fifth and Eighth Circuits, which apply an *ad hoc*, multi-factor approach. Pet. App. 20a. The Federal Circuit also explicitly held that, as a matter of law, Petitioner's fixed-price contracts could not support *any* expectation that the government would not retroactively impose additional costs based upon the same transactions. *Id.* 48a.

The Federal Circuit then concluded that EPACT satisfied its two-part test. *First*, Petitioner "benefited" from its purchase of government-enriched uranium, while the enrichment process "contributed to a societal problem" in the form of contamination of the government's enrichment plants. Pet. App. 31a-32a. *Second*, EPACT's retroactivity did not "violate[] the utilities' reasonable expectations." *Id.* 34a. The majority reasoned that the utilities should have "expected" that their purchases of enrichment services would subsequently expose them to assessments of hundreds of millions of dollars to fund the clean-up of the government's enrichment facilities because: (1) production of energy from nuclear sources is a highly regulated field; (2) the utilities knew that the government's production of enriched uranium would eventually require that the plants be decontaminated (even if the utilities didn't know *they* would have to pay for it), and (3) Commonwealth Edison could have "easily foreseen" that Congress might create a wholly new law retroactively imposing additional charges related to the purchase of enrichment services, which was "telegraphed" by statutes such as CERCLA and a long tradition of governmental regulation of the environment. *Id.* 36a-37a, 51a.[7]

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[7] A panel of the Federal Circuit contemporaneously issued an opinion, decided under the constraints of the *en banc* decision, dismissing similar claims brought by three other utilities. Pet. App. 53a-68a. But for the *en banc* decision, the panel would have held that the assessments violated due process. Three dissenting members of the *en banc* court adopted the panel

This Petition followed.[8]

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for two reasons. *First*, the importance of the decision below is manifest. Not only is the severe retroactivity of the EPACT assessment unparalleled in the Nation's history, but the Federal Circuit's exceedingly broad conception of its own exclusive jurisdiction guarantees that its lenient test will govern subsequent challenges to numerous other retroactive exactions. This case is also an important successor to *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), for it presents this Court with the opportunity to both (i) clarify which classes of financial exactions are immune from a takings claim, and (ii) give effect to the judgment in that case, which the lower courts have limited narrowly to its precise facts.

Second, the Federal Circuit's legal standard for evaluating the constitutionality of retroactive exactions conflicts with this Court's precedents and with decisions of other circuits. Other courts have been faithful to this Court's direction that retroactive assessments should be evaluated on the basis of "*ad hoc*, factual inquiries into the circumstances of each particular case." *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986). The Federal Circuit, by contrast, adopted a *per se*, two-part test, which assigns no weight whatsoever to a number of critical considerations. For example, the Federal Circuit eschewed *any* consideration of the period of retroactivity, the amount of the exaction, and the assessed party's responsibility. In addition,

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opinion. See Pet. App. 52a (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* 53a-68a (Friedman, S.J., joined by Mayer, C.J.). The dissenters emphasized that the *government* alone bore responsibility for causing the contamination. Pet. App. 65a. Furthermore, "when the [u]tilities entered into the [enrichment] purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs." *Id.* 63a.

[8] Parallel petitions have been filed by three utilities seeking review of the panel decision in *Maine Yankee*, *supra*. See No. 01-1020, *Sacramento Muni. Util. Dist.* v. *United States*; No. 01-1155, *Maine Yankee Atomic Power Co.* v. *United States*; and No. 01-___, *Omaha Public Power Dist.* v. *United States* (filed contemporaneously with this Petition).

because Congress enacted the EPACT assessment to further the government's self-interest in profiting from the sale of USEC in contravention of the utilities' understanding of the liabilities they were assuming under the enrichment contracts, this case presents a fitting opportunity to answer the question left open by *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 471 (1985): "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause.[9]

I. The Extraordinary Importance Of The Federal Circuit's *En Banc* Ruling And Of The Question Presented Merits This Court's Review.

1. By any measure, the *en banc* Federal Circuit has issued a constitutional ruling of exceptional importance. EPACT is not merely "severely retroactive" (Pet. App. 31a), but in fact is unrivaled in the history of the Republic. No court has ever sustained such a scheme. The 1992 EPACT statute facially reaches transactions dating back to 1945 and imposes assessments totaling some $2.25 billion. Petitioner's liability alone reaches approximately $140 million to date and will exceed $235 million in total, more than any other utility. Suits brought by over thirty utilities now pending in the Court of Federal Claims and Federal Circuit turn on the outcome of this and the related petitions for certiorari.

But more is at stake here than just EPACT. In the course of its decision, the *en banc* Federal Circuit adopted an exceedingly broad conception of its own exclusive jurisdiction, holding that the constitutionality of other retroactive federal exactions must similarly be decided in the Court of Federal Claims, under the test adopted in this case, at least whenever the plaintiff is subject

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[9] Question 3 presented by this Petition seeks review of the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines. The grounds for granting certiorari on that question are set forth in a contemporaneously filed petition for a writ of certiorari, No. 01-___, *Omaha Public Power Dist.* v. *United States*.

to "a known and fixed series of payments over time." See Pet. App. 2a (adopting the analysis of *Consolidated Edison Co.*, 247 F.3d at 1384); *supra* at 5 n.5. That jurisdictional ruling guarantees not only that it will be impossible for a circuit conflict to develop over the constitutionality of the EPACT assessment, but also that the exceedingly lenient, *per se* test adopted by the *en banc* court in this case (see Part II, *infra*) will govern both takings and due process challenges to numerous other statutory schemes.

The decision below has particular significance because the Court of Federal Claims is also the exclusive forum for breach of contract claims against the government (see 28 U.S.C. 1491(a)(1)), and its decision cannot but seriously undermine the private sector's faith in the government "as a reliable contracting partner in the myriad workaday transactions of its agencies." *United States* v. *Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion). The *en banc* Federal Circuit effectively held that there can be no constitutional impediment to Congress' retroactive imposition of additional costs on its contracting partners. The court deemed the first element of its two-part test for sustaining retroactive exactions – that the assessment not be "severely disproportionate" to the "benefit" received – to be satisfied as a matter of law in the context of *every* government contract. Thus, the Federal Circuit "easily disposed of" the benefit issue because Petitioner "benefited from the government's provision of enrichment services" simply by receiving the enriched uranium it purchased. Pet. App. 31a.[10]

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[10] The Federal Circuit's analysis is equally applicable to the common circumstance in which the government is the purchaser rather than the vendor under a contract, for the private party in that circumstance equally receives the "benefit" of the government's business. But in any event, the decision below has considerable significance in light of the many diverse products and services supplied by the government. See, *e.g.*, *United States* v. *Texarkana Trawlers*, 846 F.2d 297 (CA5 1988) (loans to fishing industry); *Wood* v. *United States*, 961 F.2d 195 (CAFC 1992) (forfeiture auctions); *Radiation Sterilizers, Inc.* v. *United States*, 867 F. Supp. 1465 (E.D. Wash. 1994) (cesium leasing); *Kiowa Indian Tribe* v. *City of Lawton*, 646 F. Supp. 1051 (W.D. Okla. 1986) (water services to Indian tribes); *Complaint of Walker's Midstream Fuel and Service Co.*, 636 F. Supp. 339 (W.D. Ky. 1986)

Regarding the second element of its test – the assessed party's "reasonable expectations" – the Federal Circuit held that government contractors, whatever the facts, cannot have *any* constitutionally protected "expectation" that the government will not retroactively rewrite the terms of the bargains it has made, because the government has sovereign authority to do virtually whatever it pleases. "The question * * * is not what [a government contractor] could expect the United States as a contracting party to do but what it could reasonably expect the United States as sovereign to do." *Id.* 35a. Thus, "a fixed price in a government contract *cannot create expectations* that the government will not use its sovereign power to impose additional costs." Pet. App. 48a (emphasis added).[11]

(navigational aids); *Capital Development Co.* v. *United States*, 49 Fed. Cl. 178 (Fed. Cl. 2001) (timber sales); *Moncrief* v. *United States*, 43 Fed. Cl. 276 (Fed. Cl. 1999) (oil and gas lessees on federal lands); *Hughes Communications Galaxy, Inc.* v. *United States*, 34 Fed. Cl. 623 (Fed. Cl. 1995) (satellite launch services); *Mangual* v. *United States*, 27 Fed. Cl. 480 (Fed. Cl. 1993) (scholarships); Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177, 1222 (2000) (nuclear waste processing, mortgages, and low-income housing).

[11] The Federal Circuit also reached the insupportable conclusion that a contract creates no constitutionally significant expectation even when, as in this case, it is entered into by sophisticated parties that are fully informed about the relevant risks. The court of appeals found its expectations analysis perversely *enhanced* by the fact that "all parties were aware of the hazardous nature of the materials." *Id.* 37a. Relying entirely on inapposite cases in which only *one* party was aware of potential risks – *Usery v. Turner Elkhorn*, 428 U.S. 1, 28 (1976), in which mine operators knew of the possibility of black lung disease, and *General Motors Co.* v. *Romein*, 503 U.S. 181, 191-92 (1992), in which employers relied on an erroneous view of state law and thus "took their chances," the Federal Circuit held that, because utilities knew that uranium enrichment caused pollution, they should have *expected* that the government would later impose a retroactive exaction in breach of its solemn undertaking.

Similarly significant is the breadth of the Federal Circuit's holding, not limited to the nuclear industry, that environmental regulation defeats any expectation against retrospective legislation. The decision below therefore effectively grants *carte blanche* for the imposition of severe, retrospective assessments for environmental remediation because any remotely imaginable scheme is *a fortiori* constitutional in light of this case, which sustained a $2.25

The importance of the Federal Circuit's expectations analysis is only enhanced by the fact that it is a self-fulfilling prophecy. Because "the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." *Lucas* v. *South Carolina*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). It is hard to imagine a circumstance in which, after the *en banc* decision below and in light of the Federal Circuit's assertion of broad exclusive jurisdiction, a government contractor could assert that it had no "reasonable expectation" that it would be required to pay a previously unimaginable sum to redress what the government has concluded in its unreviewable discretion to be appropriate. Even accepting that "[s]ome circularity must be tolerated in these matters" (*id.*), this Court should not let such an extraordinary ruling pass unreviewed. "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265-66 (1994). "[C]ontractual or property rights," in particular, are "matters in which predictability and stability are of prime importance." *Id.* at 271.

2. This Petition also presents an important opportunity for this Court to resolve the persistent and intolerable disagreement about the scope and effect of its decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). In particular, this case will permit the Court to define the class of monetary exactions that, because of their relationship to specific property interests, are subject to challenge under the Takings Clause. The Federal Circuit rejected Petitioner's takings claim out of hand because five members of this Court in *Eastern Enterprises* "agreed that regulatory actions requiring the payment of money are not takings." Pet. App. 20a. But the court of appeals erred in characterizing EPACT as involving "the mere imposition of an obligation to pay money" (*id.* 21a). This is not a case in which

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billion liability, reaching back more than four decades, that was not based upon any responsibility for causing the problem, but simply served as the most convenient way to generate revenue.

the statute "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms" (*Eastern Enters.*, 524 U.S. at 543 (Kennedy, J., concurring)). To the contrary, the assessment is "measured by a property interest" (*id.* at 540) – *viz.*, the Separative Work Units of enriched uranium purchased by Petitioner. Indeed, D&D Fund liability *attaches* to the enriched uranium. Thus, a transfer of the enriched uranium passes the liability along with the material and correspondingly diminishes its value. See 10 C.F.R. 766.3. Nor is EPACT "indifferent" to the property that will be used to satisfy the assessments. *Id.* Rather, the statute contemplates that utilities will secure a stream of income by passing on the assessments in rates. See 42 U.S.C. 2297g-1(g). Put simply, EPACT is designed to "take" that discrete stream of income.[12]

Even assuming that a majority of this Court were not to agree that the EPACT assessment is susceptible on this basis to a takings claim, review is warranted to give effect to the judgment in *Eastern Enterprises* in light of the treatment that decision has received at the hands of the lower courts in the four years since that case was decided. Those courts, including the *en banc* Federal Circuit in this case, have generally accepted the federal government's argument that *Eastern Enterprises undermines*

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[12] The Federal Circuit properly rejected the government's argument (Gov't Br. at 25) that this provision negates the utilities' ability to challenge the assessments. First, no evidence exists that Petitioner was able to pass on such costs. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dep't of Bus. Reg.*, 496 U.S. 18, 46-47 (1990) ("We have repeatedly recognized that determining whether a particular cost has been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry.") Moreover, as this Court made clear, neither a party's right to challenge an unconstitutional assessment *nor its right to recover a refund of such assessment* is affected by its alleged "pass-on" of the assessment to its customers. *Id.* at 18. Allowing the Government to "collect * * * unlawful taxes by coercive means and not incur any obligation to pay them back" contravenes due process. *Id.* at 39; see also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-88 (1968) (rejecting argument that "passing on" improper overcharges to customers eliminates plaintiff's damages).

challenges to retroactive exactions.[13] Employing a novel combinatorial jurisprudence that treats the whole as less than the sum of its separate parts, they reason that five Justices in *Eastern Enterprises* agreed that a mere order to pay money can never constitute an unlawful taking, and furthermore that substantive due process claims are subject to the most lenient form of rationality review because no combination of five Justices reached the question whether to embrace Justice Kennedy's more rigorous review of severely retroactive legislation under the Due Process Clause. The government's position has thus consistently been that "*Eastern Enterprises* is inapposite, limited to its facts, and, by virtue of its fragmented parts, only binding in its specific result – holding the Coal Act assessment unconstitutional as applied to Eastern Enterprises." Gov't Br. 30. Generally agreeing, the lower courts have afforded no weight *either* to the *Eastern Enterprises*' plurality's recognition of the parallel between takings analysis and due process analysis (524 U.S. at 537) *or* to Justice Kennedy's explicit statement that his views were "in *full accord* with many of the plurality's conclusions" (*id.* at 568 (emphasis added)).[14]

The Federal Circuit's embrace of the government's remarkably ironic reading of *Eastern Enterprises* illustrates perfectly why only a further decision by this Court can give effect to the judgment in that case. For the provision of the Coal Act invalidated as applied in *Eastern Enterprises* was, by almost

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[13] See, *e.g.*, *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (CA8 2001); *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 170 & n.3 (CA3 1999); *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246, 1253, 1254 n.5 (CADC 1998).

[14] Compare, *e.g.*, the Federal Circuit's contention that "[i]n these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational" (Pet. App. 24a) with, *e.g.*, 524 U.S. at 548 (Kennedy, J., concurring) (courts must "give[] serious consideration to retroactivity-based due process challenges," "confirming the vitality of our legal tradition's disfavor of retroactive economic legislation"), and with *id.* at 549 ("As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.").

any measure, more defensible than EPACT: there is no *conceivable* argument that purchasers of enriched uranium acted in any way that should have led them to expect that they would later have to pay for environmental remediation; the Coal Act's effective period of retroactivity was similar to EPACT's; the Coal Act imposed a far smaller financial burden on individual companies; and the government was not acting in pursuit of its own fiscal self-interest in enacting the Coal Act. The Federal Circuit nonetheless plainly would, under its two-part test, sustain the retroactive application of the Coal Act even to the operator in *Eastern Enterprises*. That operator plainly received a "benefit" (Pet. App. 27a) from the employees for which it was responsible under the Coal Act, inasmuch it was undisputed that "[f]or many years Eastern benefited from the labor of those miners" (524 U.S. at 553 (Breyer, J., dissenting)). And, in the Federal Circuit's view, the coal companies would have had no "reasonable expectation" against retroactive liability, for the coal industry is (like the nuclear industry) "highly regulated" (Pet. App. 36a), and a wide range of laws – continuing the tradition of workers' compensation laws and the assessment sustained by this Court in *Turner Elkhorn* – just as strongly "telegraphed" (*id.* 43a) the possibility of retroactive liability.

Certiorari accordingly is warranted both to clarify the scope of the takings analysis of *Eastern Enterprises* and to give effect to this Court's judgment in that case.

II. The *En Banc* Federal Circuit's *Per Se* Standard Conflicts With Decisions Of This Court And Other Circuits.

1. Time and again, this Court has held that challenges to the constitutionality of retroactive assessments must be evaluated with particular attention to their individual and often unique facts. The Court has declined to adopt categorical rules or to render whole classes of retrospective legislation either immune to all constitutional challenge or beyond Congress' power to enact in otherwise appropriate circumstances. Thus, in *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986), the Court unanimously reiterated that it had "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth

Amendment, and [had] relied instead on *ad hoc*, factual inquiries into the circumstances of each particular case." This Court has similarly evaluated claims that retroactive exactions violate the Due Process Clause by considering whether, on the particular facts, the legislation is "harsh and oppressive." *United States* v. *Hemme*, 476 U.S. 558, 567 (1986). For example, it has evaluated whether the retroactive application of a tax violated the Due Process Clause not according to a categorical rule but instead by "[f]ollow[ing] the approach in [its] prior cases," and "'consider[ing] the nature of the tax and the circumstances in which it [was] laid.'" 476 U.S. at 568.

Other circuits have remained faithful to this Court's decisions. Thus, the *en banc* Federal Circuit had to acknowledge that its *per se* two-part test engenders a circuit conflict: the court's opinion cites with a "but see" the Fifth Circuit's holding that takings challenges to a retroactive exactions are to be evaluated according to "*ad hoc*, fact-specific factors" and the Eighth Circuit's holding that a due process challenge to any such statute "would be 'essentially *ad hoc* and fact intensive.'" Pet. App. 20a (addressing *United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001), and *U.S. Fidelity & Guar. Co.* v. *McKeithen*, 226 F.3d 412, 416 (CA5 2000)). And the Fifth Circuit's *ad hoc* approach is not limited to takings cases, for it has similarly held that, "when retroactive legislation is challenged on due process grounds, a case-by-case analysis is required." *Ferman* v. *United States*, 993 F.2d 485, 490 (1993) (applying *Wiggins* v. *Commissioner*, 904 F.2d 311, 316 (CA5 1990)).

But the *en banc* Federal Circuit flatly rejected that approach, adopting instead a categorical rule under which "even severe retroactive obligations for past acts" are to be sustained whenever the rule's "two conditions are satisfied."[15] Moreover,

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[15] The court's statement that it was not "attempting to define *exactly* when retroactive legislation will be held unconstitutional" (Pet. App. 31a (emphasis added)) cannot be read to suggest that the Federal Circuit will subsequently examine such legislation more rigorously. To the contrary, the court immediately indicated that, in a later case, it might *eliminate* even the few restrictions on retrospective liability it applied here: "It may well be that

consistent with its "as-a-matter-of-law" approach, the Federal Circuit held that retroactive assessments were to be sustained without regard to any further evaluation of what the *actual* facts might be. For example, Petitioner's complaint (at ¶¶ 22, 23) alleges that the pollution redressed under EPACT arises from the government's use of the enrichment plants for military purposes and from the government's own choices in disposing of materials generated therefrom. Indeed, congressional testimony demonstrates that much of that pollution resulted from *intentional* government malfeasance in failing to act in an environmentally responsible manner. A.S.A. 137. The Federal Circuit recognized that, on the government's motion to dismiss, all allegations contained in the complaint must be treated as true and all inferences drawn in favor of the plaintiff. Pet. App. 17a. It nonetheless squarely held that Petitioner's allegations were irrelevant as a matter of law because the judiciary lacks any power to "determine[e] the actual state of facts" surrounding the necessity or impact of even the most extraordinary exaction. *Id.* 24a. That standard eliminates any opportunity to test whether an assessment is "arbitrary" because, for example, the government itself is principally responsible for causing the damage or has previously imposed the *identical* costs on its contracting partners.

2. Nothing in the Federal Circuit's two-part test – which considers only whether the assessment is "severely disproportionate" to the "benefit" received and violates "reasonable expectations" – substitutes for the fact-intensive inquiry mandated by this Court's precedents and applied by other circuits.

The first part of the Federal Circuit's test fails even to require a substantial nexus between the retroactive exaction and the party on which it is imposed. For example, the EPACT D&D Fund pays not merely for the clean up of the government's enrichment plants but also for a $490 *million* clean-up of thorium and uranium production facilities owned by private

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legislation is constitutional if *either* of the two conditions is satisfied, but we need not decide that question in this case." *Id.* (emphasis added).

companies. Not even the Federal Circuit, in its *post hoc* rationalization of grounds on which to sustain the EPACT assessment as rational, was able to articulate a ground for exacting money from utilities for that purpose, acknowledging, to the contrary, that "the utilities were not responsible" in any sense for that pollution. Pet. App. 33a n.19. Instead, the court of appeals, without further explanation, dismissed the enormous clean-up costs as a "*de minimis* diversion of funds." *Id.*

Nor does the Federal Circuit's reference to the "proportionality" of the assessment (Pet. App. 31a) further constrain the government's ability to impose severe retroactive exactions. In particular, as Petitioner's complaint alleges (J.A. 524-25), and as evidence before Congress demonstrated (A.S.A. 281-82), all or nearly all of the costs of remediating the government's enrichment plants arose from the use of those plants for military purposes, which constituted *ninety-six percent* of all enrichment until 1970. J.A. 524. The Federal Circuit nonetheless deemed the assessments "proportionate" – despite the fact that private enrichment neither contributed to pollution arising from military enrichment nor materially increased the costs of remediation.

The second part of the Federal Circuit's test – whether the retroactive assessment contravenes "reasonable expectations" – is unobjectionable in principle but, as conceived by the court of appeals, fails to provide any independent protection against unconscionable exactions. Rather, upon analysis, it actually provides less protection than a genuine rationality requirement might. For the Federal Circuit capped what it counted as legitimate expectations by the degree of prior governmental regulation. Because the nuclear industry is "highly regulated" (Pet. App. 36a) and because state and local governments had long ago adopted extensive environmental regulations (*id.* 36a-40a), the court of appeals held that electric utilities could have no "reasonable expectation" that the federal government would

not retroactively impose upon them the costs of remediating the government's enrichment facilities – *Q.E.D.*[16]

The transparent flaw in the Federal Circuit's test is that it effectively converts the extensive intrusion of modern government into all spheres of private activity into an open-ended license to seize private property for past acts. Unlike the decision below, this Court's precedents do not look to whether other regulations "telegraphed" (Pet. App. 43a) the possibility of retroactive legislation. Indeed, the Federal Circuit's analysis runs directly contrary to the thrust of this Court's recent expectations jurisprudence, which requires an inquiry not merely into whether prior legislation in the same general area could undermine property owners' expectations, but also into whether any legislatively inspired erosion of such expectations, including erosion by laws directly applicable to the subject matter at hand, is "objectively reasonable." Thus, in *Palazzolo* v. *Rhode Island*, the Court rejected a rule prohibiting subsequent purchasers of property that was already subject to various land-use regulations from raising takings challenges even to those very regulations, reasoning that such a standard would give the state the unfettered power to "shape and define property rights and reasonable investment-backed expectations." 121 S. Ct. 2448, 2462 (2001). The relevant inquiry, the Court held, is instead whether, in light of the facts and circumstances, the destruction of property interests is so "unreasonable or onerous" as to require just compensation. *Id.*; see also *Lucas*, *supra*, 505 U.S. at 1033 (Kennedy, J., concurring) (calling for inquiry into "objective reasonableness" of governmental action). That reasoning is no less applicable if the analytic rubric being employed is substantive due process rather than takings. The Federal Circuit, by contrast, looked to the entire surrounding array of environmental regulation (including regulation concededly inapplicable to the matters at issue) and did so

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[16] The court of appeals did not suggest that its test was limited to "highly regulated" businesses, but the decision below in any event has great significance even if it is construed in that fashion, as can be seen from the appendix (Pet. App. 175a-179a), which collects an illustrative list of the many sectors of industries that can be so classified.

without the slightest consideration of whether it would be reasonable to deem utilities' expectations defeated by extrapolation from the tangentially relevant regulations encompassed within that survey.

This Court's precedents, unlike the decision below, furthermore deem regulation to be relevant to the expectations analysis only when it would cause a reasonable person to conclude that the government was likely to impose the *specific form of liability* in question. *Eastern Enterprises* thus rejected the contention of the court of appeals and the dissent that "the pattern of federal intervention in the coal industry" vitiated the employer's expectations. 524 U.S. at 519. Citing *Connolly*, *supra*, 475 U.S. at 227, the *Eastern Enterprises* plurality recognized that prior governmental regulation undermines a sophisticated business's "expectations" only if it gives "sufficient notice" that a specific form of retroactive liability might be imposed – in that case, "that lifetime health benefits might be guaranteed to retirees several decades later." *Id.* at 536. Justice Kennedy has similarly cautioned that "*the means*, as well as the ends, of regulation must accord with the owner's reasonable expectations." *Lucas*, 505 U.S. at 1035 (concurring opinion) (emphasis added).

The regulations identified by the Federal Circuit do not meet this Court's far more rigorous standard for deeming regulation to defeat a reasonable expectation against retroactive liability. Although the private owners of nuclear power plants are of course "highly regulated" (Pet. App. 36a), the more salient point is that they are *not* heavily regulated with respect to the specific subject matter of the EPACT assessment. The relevant regulations and contracts imposed complete responsibility for the enrichment process upon the *government*. See *supra* at 2. The only reasonable expectation that could possibly have arisen from that regulatory scheme was that the responsibility for any environmental remediation stemming from the enrichment process would likewise be the government's.

In addition, although the court of appeals cited an array of environmental legislation, "virtually no environmental law other than CERCLA (and its state-law equivalents) allocates

potentially massive liabilities to activities performed entirely in the past and completed before the law took effect." Bruce Howard, *Reforming Retroactivity and Current Owner Liability Standards in CERCLA to Increase Fairness and Efficiency*, 9 J. NAT'L RESOURCES & ENVT'L L. 325, 326-27 (1994). At the very least, CERCLA could not affect Petitioner's expectations regarding the more than forty percent of its purchases that were made before that statute's effective date in 1980. Moreover, the irony in the Federal Circuit's attempt to justify EPACT based upon CERCLA principles is that, if Congress *had* decided to resolve remediation of the government's plant though CERCLA, the *government* would plainly be responsible for the clean-up costs because the government expressly assumed ownership of all materials used in the processing and maintained exclusive control over the operation of the plants and disposal of waste materials. J.A. 525. None of the cases relied upon by the Federal Circuit has extended CERCLA liability to a party in Petitioner's position. Cf. *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980) (sustaining takings claims despite pre-existing state regulations that arguably put private party on notice that interest on interpleaded fund would be seized by state).[17]

Also, the Federal Circuit's expectations analysis jettisons a key CERCLA principle that allocates liability based upon the "relative fault of the parties" *potentially* responsible for contribution. *Kerr-McGee Chem. Corp.* v. *Lefton Iron & Metal*

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[17] Thus, in *United States* v. *Aceto Agricultural Chemical Corp.*, 872 F.2d 1373, 1382 (CA8 1989), the court found a party "potentially" responsible under CERCLA when it hired a contractor that was "performing a process on products owned by defendants for defendants' benefit and at their direction." Similarly, in *Hercules, Inc.*, 247 F.3d at 715, *potential* liability turned on either *ownership* of hazardous materials provided to another for processing or *control* over the formulation and disposal of materials. *Id.* (citing *United States* v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (CA8 1986)). Here, by contrast, Commonwealth Edison had neither ownership nor control of the enriched uranium purchased from the government. The vast majority of CERCLA cases have firmly rejected extension of liability to mere purchasers of products. See, *e.g.*, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1336 (CA11 2000).

Co., 14 F.3d 321, 326 (CA7 1994). Courts have not hesitated to assign one hundred percent of the responsibility to the party primarily responsible for the contamination. See *Foster* v. *United States*, 130 F. Supp. 2d 68, 78 (D.D.C. 2001) (one-hundred-percent liability imposed on District of Columbia when "facts proved at trial * * * [that] the District – and only the District – was integrally and actively involved in the disposal of the hazardous waste found on the Property * * *. There is no evidence to implicate any other source."); see also *PMC, Inc.* v. *Sherwin Williams Co.*, 151 F.3d 610 (CA7 1998) (allocation of one-hundred-percent liability to party responsible for *most* of waste disposal); *Kelley* v. *EPA*, 15 F.3d 1100 (CADC 1994). And, by immunizing USEC from liability, EPACT again violates the fundamental CERCLA principle that subsequent buyers of contaminated property (especially those with knowledge of the contamination) remain potentially responsible for funding remediation. 42 U.S.C. 9607(a)(1). If anything, therefore, CERCLA *reinforced* Petitioner's expectation that the government would bear responsibility for contamination created by the government's own enrichment activities.[18]

3. The legal error in the Federal Circuit's decision is not merely that it adopts a *per se* test for evaluating the constitutionality of even "severely retroactive" exactions, or that its two-part test is circular and fails to protect the interests underlying the Takings and Due Process Clauses. Just as important, the Federal Circuit's test assigns *zero* weight to a large number of factors that other circuits, and indeed this Court, have deemed highly relevant to their examination of retroactive exactions. The Federal Circuit's test renders legally immaterial at least *seven* important considerations, each of which calls EPACT into fundamental question.

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[18] Courts have also noted the constitutional difficulty posed by retroactive CERCLA application even when the defendant has caused at least some of the harms at issue. *E.g.*, *Asarco, Inc.* v. *Department of Ecology (State of Washington)*, No. 98-2-01729-2 (Wash. Super. Ct., Thurston Cty., Dec. 16, 1999); *United States* v. *Asarco, Inc.*, No. CV 96-0122-N-EJL, 1999 U.S. Dist. LEXIS 18924, at **26-27 (D. Idaho Sept. 30, 1999).

First, the Federal Circuit's decision leaves no room for courts to consider the degree of the assessment's retroactivity – *i.e.*, how far back in time it reaches. That cannot possibly be right, for the passage of time not only creates "settled" expectations, but also makes a retroactive assessment progressively more "arbitrary." It thus makes a great deal of difference whether legislation assigns new burdens to an act undertaken three months ago (as often occurs in the tax context) or instead three *decades* ago (as in this case). The government's power to impose retroactive burdens "must at some point give way to the [assessed party's] interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring).

Five members of the Court expressly adopted that view in *Eastern Enterprises*. The *very first* fact that the plurality deemed relevant to its analysis of the plaintiffs' expectations was that the Coal Act's "beneficiary allocation scheme reaches back 30 to 50 years," "long after the company believed its liabilities * * * to be settled." 524 U.S. at 532-33. Justice Kennedy, concurring, similarly emphasized that "[i]f retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548. The Court made essentially that point in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, explaining that, although the Court had "held that the retroactive assessment of a tax increase does not necessarily deny due process," "beyond some *temporal point* the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation,' depending on 'the nature of the tax and the circumstances in which it is laid.'" 496 U.S. 18, 41 n.23 (1990) (emphasis added).[19]

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[19] Although this Court has afforded considerable deference to Congress' determination of how best to reorder economic rights and obligations, even retrospectively, it has generally done so in cases in which the period of retroactivity is relatively short. This Court's due process jurisprudence thus accommodates the "'customary congressional practice'" of adjusting revenue legislation "'confined to short and limited periods required by the practicalities of producing national legislation.'" *Carlton*, 512 U.S. at

Courts of appeals other than the Federal Circuit have similarly accorded great weight to the period of retroactivity. The Third Circuit, for example, has adhered to its view that the first element of any inquiry into whether a retroactive exaction violates the Due Process Clause is "the length of time of the retroactivity," and has concluded that a retroactive period of eleven years "approaches the edge of permissible legislative action." *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 173 (1999); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 652 (1999); *Tate & Lyle, Inc.* v. *Commissioner*, 87 F.3d 99, 107 (CA3 1996). The Ninth Circuit has applied this Court's decisions, which have "placed considerable weight on the brevity of the period of retroactivity," and has joined the Second Circuit in holding that it should be "'a significant factor * * * in the overall assessment of the constitutionality of the legislation.'" *Licari* v. *Commissioner*, 946 F.2d 690, 694-96 (1991) (quoting *Canisius College* v. *United States*, 799 F.2d 18, 26-27 (CA2 1986)). And the Fifth Circuit has similarly called for a "case-by-case analysis" in which the period of retroactivity is "one factor to be considered." *Wiggins* v. *Commissioner*, 904 F.2d 311, 316 (1990).

Second, the Federal Circuit's test, which explicitly encompasses even the most "severe" assessments, deems immaterial the magnitude of the burden imposed – generally, how much money must be paid. Once again, that cannot be right. As a matter of common sense, it makes a great deal of difference if the assessment is a few thousand dollars (as in most of this Court's cases dealing with retroactive tax legislation) or is instead $235 *million* (the amount Petitioner must pay under EPACT). Thus, in the context of retroactive tax burdens, the Court has ruled that, "[w]hile the amount of tax is not dispositive, it is one circumstance of the transaction to be

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32 (quoting *Darusmont*, 449 U.S. at 296)). See also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (same). Justice O'Connor has thus recognized that "[i]n every case in which [this Court has] upheld a retroactive tax statute against due process challenge * * * the law applied retroactively for only a relatively short period of time prior to enactment." *Carlton*, 512 U.S. at 38 (concurring opinion).

considered." *United States* v. *Hemme*, 476 U.S. 558, 571 (1986). And the Third Circuit has thus described "the aggregate burden" of an exaction as "significant under our due process jurisprudence." *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 672 (1999).

Third, the Federal Circuit's test assigns no weight to the relative responsibility of the government and the assessed party for the problem that Congress seeks to redress through the extreme remedy of retroactive legislation. For all nine Justices in *Eastern Enterprises*, the single most important fact in determining whether the assessment was constitutional was whether the coal operators in that case were responsible for the employees' expectation of lifetime health benefits. Compare 524 U.S. at 530-31 (plurality opinion) and *id.* at 549 (Kennedy, J., concurring) with *id.* at 559-60 (Breyer, J., dissenting) (arguing that the assessment was valid principally because operators had made an implicit promise to pay). In this case, there is no suggestion that the utilities created any expectation that *they* would pay for environmental remediation. Moreover, the government *admitted* that the "assessments are *not* premised upon any responsibility [by the utilities] for contamination" at the government's enrichment facilities (Gov't C.A. Br. 31 (emphasis added)), and it is furthermore undisputed that utilities "had no control over the activities" (*Eastern Enters.*, 524 U.S. at 532) at those plants. The Federal Circuit's test, however, makes those facts totally irrelevant.

Fourth, the Federal Circuit's test assigns no weight to the circumstances said to require Congress' departure from the normal processes of prospective legislation. Thus, this Court has sustained retroactive exactions, in limited circumstances, "to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Landgraf*, 511 U.S. at 268. The *en banc* Federal Circuit, by contrast, categorically held that burdensome retroactive assessments are appropriate whenever Congress perceives any "societal problem." Pet. App. 31a. That formulation, of course, imposes no limitation at all:

"Every law touching on an area in which Congress has previously legislated can be said to serve the legitimate purpose of fixing a perceived problem with the prior state of affairs – there is no reason to pass a new law, after all, if the legislators are satisfied with the old one." *Carlton*, 512 U.S. at 36 (O'Connor, J., concurring).

Fifth, the Federal Circuit's test deems it irrelevant whether an assessment is *wholly retroactive* and thus lacks any prospective component. This is an important consideration because retroactive legislation can unjustly target not just "unpopular groups or individuals" (*Landgraf*, 511 U.S. at 267) but entities of means that are nonetheless powerless to avoid the burden imposed because the events giving rise to liability – here, the enrichment contracts – all lie in the past. In addition, pure retrospectivity carries the risk that Congress will "induc[e] [private parties] to engage[] in [the assessed] transactions," then retroactively change the understood terms of the bargain. *Carlton*, 512 U.S. at 32. The decisions of this Court on which the Federal Circuit relied thus generally involved the "'retroactive *application*'" (Pet. App. 33a (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984)) (emphasis added)) of statutes that applied equally on a prospective basis.

EPACT, of course, is purely retroactive. Moreover, the Federal Circuit acknowledged that the government induced utilities such as Petitioner to purchase enrichment services from the United States, rather than from foreign suppliers, by lowering the costs under its fixed-price contracts and promising that those costs would not exceed a fixed ceiling. Pet. App. 7a. Just as "the tax consequences of commercial transactions are relevant, and sometimes dispositive" (*Carlton*, 512 U.S. at 38 (O'Connor, J., concurring)), out-of-pocket costs were manifestly a vital consideration in the utilities' decision to contract with the federal government. Yet decades after the contracts were fully performed, the government imposed billions of dollars of new costs based upon the same purchases on its former customers

who (apart from the protections of the Takings and Due Process Clauses) are powerless to do anything about it.[20]

Sixth, the Federal Circuit's test specifically assigns no weight to whether the federal government acted out of its own self-interest. In *United States* v. *James Daniel Good Real Property*, this Court held that the Due Process Clause guarantees a private party the right to notice and an opportunity to be heard before the government forfeits his real property. The Court deemed the availability of a neutral decisionmaker particularly critical because "the Government has a direct pecuniary interest in the outcome of the proceeding," adopting Justice Scalia's view that "'[i]t makes sense to scrutinize governmental action more closely when the State stands to benefit.'" 510 U.S. 43, 56 (1993) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)). A plurality of the Court made an analogous point in *Winstar*, relying on cases decided under the Contracts Clause that "have demonstrated a similar concern with governmental self-interest by recognizing that 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.'" 518 U.S. at 897 n.41 (quoting *U.S. Trust Co.*, *supra*, 431 U.S. at 26, and citing *Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412-13 & n.14 (1983)). And in *Eastern Enterprises*, Justice Kennedy noted the heightened scrutiny applicable to "the Government's self-enrichment." 524 U.S. at 544.[21]

The Ninth and Tenth Circuits have similarly extended the Contracts Clause analysis of *U.S. Trust* to the substantive due process context. See *Sheridan Square P'ship* v. *United States*,

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[20] The abuses that can arise from purely retroactive assessments are apparent from Congress' decision to "diver[t]" (Pet. App. 33a n.19) $490 million of the EPACT D&D Fund to pay to clean up private thorium and uranium facilities. See *supra* at 4.

[21] The government's self-interest is particularly apparent when the assessed party has already paid for the service in question. Here, as in *Webb's Fabulous Pharmacies*, *supra*, 449 U.S. 155, the government may not charge a private party for a service then, by *ipse dixit*, exact still more money as a supposed further payment for the same service.

66 F.3d 1105, 1108 (CA10 1995) ("Notwithstanding our usual deference to congressional enactments, we review economic legislation with particular scrutiny when a government attempts to redefine or abrogate its own contractual relationships."); *Northwestern National Life Ins. Co.* v. *Tahoe Regional Planning Agency*, 632 F.2d 104, 105-06 & n.1 (CA9 1980) (applying *U.S. Trust* to Contracts Clause claim and holding that analysis under Due Process Clause is "essentially the same").

The Federal Circuit, by contrast, held that its exceedingly deferential standard of review is no less applicable to cases in which the government imposes a severe retroactive exaction solely out of fiscal self-interest than to cases in which it does so largely or wholly as a disinterested referee of competing economic claims. The overriding purpose of the government's retention of liability for clean-up of its enrichment plants was unquestionably to maximize the federal government's profits from the sale of USEC. See generally H.R. Rep. No. 102-474, Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064. The plain purpose of the D&D Fund assessments was to shift a substantial portion of the cost of that decision to the government's former contracting partners. Yet, under the Federal Circuit's test, that purpose drops out of the picture entirely.

Because Congress imposed the EPACT assessment notwithstanding the fact that Petitioner's obligations to pay for enrichment services were specifically set by fixed-price contracts, this case also provides the Court with the opportunity to answer the question it left open in *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 471 (1985): "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause. *Atchison* suggested that "the Government's impairment of its own obligations perhaps should be treated differently," invoking the heightened standard applicable under the Constitution's Contract Clause to legislation enacted in "the 'State's self-interest.'" 470 U.S. at 472 n.24 (quoting *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977)).

Seventh, the Federal Circuit's *per se* test fails to consider whether the challenged statute provides procedural protections against the imposition of unjust assessments or instead vests the executive with untrammeled discretion. "'It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.'" *Landgraf*, 511 U.S. at 267 n.20 (quoting *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment)). Thus, the decision principally invoked by the government and the Federal Circuit, *Turner Elkhorn*, sustained the retroactive imposition of health-care costs only on a generic basis, and only in the context of emphasizing the numerous avenues available to coal companies to challenge the imposition of liability for *each* worker. The availability of such individualized determinations by a neutral decisionmaker is also an important characteristic of other statutory schemes cited by the Federal Circuit, including CERCLA.

EPACT, by contrast, imposes on Petitioner an obligation to pay hundreds of millions of dollars to the federal treasury, but provides no meaningful opportunity to challenge the assessments or the expenditure of the funds exacted from them. The Federal Circuit's decision in this case also deprives the utilities of any remotely searching review of the basis for the assessments as a generic matter, including with respect to whether the "actual state of facts" necessitated the adoption of the scheme of assessments or instead rendered it arbitrary. See *supra* at 17.[22]

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[22] EPACT's failure to provide any judicial check is particularly significant in the context of the government's *self-interested* exactions. This Court has recognized the significant constitutional concerns raised when a prosecutor or adjudicator has a "personal, substantial, pecuniary interest" in the outcome. See *Concrete Pipe & Prods. Of Cal., Inc.* v. *Construction Laborers Pension Trust Fund for S. Cal.*, 508 U.S. 602, 617 (1993); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980); *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927).

Because the Federal Circuit's novel *per se* standard conflicts with the fact-intensive test mandated by this Court's precedents and applied by other circuits and specifically gives no weight to numerous factors, both generic and individual, that precedent establishes are critical to the constitutional inquiry, and because of the unique jurisdictional shield with which the Federal Circuit has insulated its unprecedented standard from intercircuit challenge and has thereby effectively given it a continuing nationwide reach – in applications to takings, substantive due process, and government contracts decisions – plenary review by this Court is imperative.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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